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No. 89-1427

In the Supreme Court of the United States

OCTOBER TERM, 1990

HERBERT PATE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's sentence must be vacated in light of *Rodriguez* v. *United States*, 480 U.S. 522 (1987).

2. Whether the district court, in accepting petitioner's guilty plea, correctly informed him of the mandatory minimum sentence.

3. Whether the district court properly imposed separate consecutive sentences under 18 U.S.C. 3147 for each offense committed while petitioner was released on bail.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 14A-15A) is unpublished, but the decision is noted at 856 F.2d 181 (Table). The opinion of the district court (Pet. App. 1A-13A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1988. A petition for rehearing was denied on October 5, 1988. Pet. App. 16A. The petition for a writ of certiorari was filed on February 5, 1990, and is therefore 13 months out of time under Rule 13.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Eastern District of New York to charges of income tax evasion, in violation of 26 U.S.C. 7201 (Count 1); wire fraud, in violation of 18 U.S.C. 1343 (Count 2); possession of firearms following conviction of a felony and while released on bail, in violation of 18 U.S.C. App. 1202(a)(l) (1982) and 18 U.S.C. 3147 (Supp. II 1984) (Counts 3 and 5); possession of an unregistered firearm following conviction of a felony and while released on bail, in violation of 26 U.S.C. 5861(d) and 18 U.S.C. 3147 (Count 4); and storing and concealing explosives following conviction of a felony and while released on bail, in violation of 18 U.S.C. 842(h) and 18 U.S.C. 3147 (Count 6). He was sentenced to a total of 12 years' imprisonment and fined $411,000. Thereafter, petitioner filed a motion to correct an illegal sentence under Fed. R. Crim. P. 35(a). The district court denied the motion, Pet. App. 1A-13A, and the court of appeals affirmed, Pet. App. 14A-15A.

1. In August 1985, petitioner, a convicted felon, was indicted for making a false statement to a probation officer, in violation of 18 U.S.C. 1001. In May 1986, while the charges against petitioner were pending and petitioner was free on bail, law enforcement officers executed search warrants at two houses owned by petitioner. At the first house, the officers seized financial records evidencing tax evasion. In addition, they seized substances used to "cut" illegal narcotics and more than 20 firearms, including a loaded pistol and a silencer. At the second residence, a mansion located on a 300-acre estate in Greene County, New York, officers seized additional documents evidencing petitioner's tax evasion and numerous firearms and explosives, including two anti-personnel mines. Some of the firearms and explosives were concealed in an underground vault accessible only by a concealed elevator. Gov't C.A. Br. 3.

In June 1986, petitioner was charged in a 31-count indictment with various offenses uncovered as a result of the searches. After lengthy plea negotiations, petitioner pleaded guilty to six offenses charged in a superseding information, including four counts of illegal possession of weapons and explosives while released on bail. Under the terms of the plea bargain, petitioner faced a maximum sentence of 20 years' imprisonment, and a maximum fine of $1.1 million. Gov't C.A. Br. 4.

In November 1986, at the hearing on petitioner's guilty plea, the district court advised petitioner of the maximum statutory sentence of 29 years and the 20-year sentencing "cap" under the plea agreement. The court informed petitioner that "when you offer a plea of guilty to six counts in this information, you assume for those purposes that the Court will sentence you to twenty years." Gov't C.A. Br. 4 (quoting C.A. App. 58-59). Petitioner replied that he understood. *Ibid.* The district court also advised petitioner that, in its view, Section 3147 required mandatory consecutive sentences of not less than two years for each of Counts 3 through 6.[1] Petitioner's attorney disagreed,

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[1] At the time of petitioner's offenses, 18 U.S.C. 3147 (Supp. II 1984), provided:

> A person convicted of an offense committed while released pursuant to this chapter shall be sentenced, in addition to the sentence prescribed for the offense to—
>
> (1) a term of imprisonment of not less than two years and not more than ten years if the offense is a felony; or
>
> (2) a term of imprisonment of not less than ninety days and not more than one year if the offense is a misdemeanor.
>
> A term of imprisonment imposed pursuant to this section shall be consecutive to any other sentence of imprisonment.

The statute has been amended to eliminate the minimum enhancements. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, § 223(g), 98 Stat. 2028; Criminal Law and Procedure Tech-

contending that Section 3147 authorized the court to impose only a single consecutive sentence for all four offenses. The district court informed petitioner that, under the court's interpretation of Section 3147, petitioner could "forget about getting out in two years, or four years or six years or eight years." Pet. App. 3A (quoting Tr. 12). At the court's request, petitioner had a further discussion with his lawyer regarding his plea. Following that discussion, petitioner reaffirmed that he wanted to plead guilty. Pet. App. 2A-4A; Gov't C.A. Br. 5.

The district court sentenced petitioner to concurrent one-year terms of imprisonment on Counts 1 and 2, a consecutive two-year term on Count 3, and consecutive three-year terms on each of Counts 4-6. Thus, the court sentenced petitioner to a total of 12 years' imprisonment. The court also fined petitioner $411,000. Pet. App. 4A, 13A.

In November 1987, almost a year after he was sentenced, petitioner filed a motion under Fed. R. Crim. P. 35(a) to correct an illegal sentence.[2] Petitioner argued, among other things, that the district court had sentenced him on the erroneous assumption that it had no power to place him on probation for the violations of Section 3147. He also asserted that the district court had failed to advise him correctly of the mandatory minimum sentence under Section 3147. Finally, petitioner alleged that the district court had

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nical Amendments Act of 1986, Pub. L. No. 99-646, § 55(g), 100 Stat. 3610.

[2] The version of Rule 35 applicable to offenses committed prior to November 1, 1987, provided that a district court could correct an illegal sentence at any time, and could correct a sentence imposed in an illegal manner within 120 days after the sentence was imposed. Rule 35 was amended, effective November 1987, to provide that a sentence may be corrected only on remand from a court of appeals or for changed circumstances. See Pub. L. No. 98-473, § 215(b), 98 Stat. 2015-2016.

erred in imposing multiple consecutive sentences under Section 3147. Gov't C.A. Br. 5.

2. The district court denied the motion. The court rejected petitioner's contention that it had imposed a term of imprisonment on the mistaken assumption that it had no power to place him on probation. The court stated that petitioner's sentence was "not imposed solely in consideration of our interpretation of Section 3147 and the sanctions mandated by the statute." Pet. App. 10A. In addition, the court explained that, in accordance with the customary practice in the Eastern District of New York, it had submitted a tentative sentence to a sentencing advisory panel of two judges. The sentencing judge and one of the advisory judges had initially recommended 15 years' imprisonment and fines, and the other advisory judge had recommended 20 years' imprisonment and fines. Pet. App. 6A-7A, 13A. The district court stated that it had reconsidered petitioner's sentence "with the clear understanding that probation was a permissible alternative under Section 3147," and reaffirmed the sentence. *Id.* at 12A-13A.

The district court also rejected petitioner's contention that Section 3147 required the imposition of a single enhanced sentence for all four felonies committed while petitioner was released on bail. The court concluded that the "clear and unambiguous language of the statute contradicts [petitioner's] argument that Section 3147 requires the court to impose only one enhanced sentence." Pet. App. 12A.

3. The court of appeals summarily affirmed the district court's denial of petitioner's Rule 35 motion "for substantially the reasons set forth in [the district court's] opinion." Pet. App. 14A-15A.

ARGUMENT

1. Petitioner first contends (Pet. 13-19) that the district court improperly imposed prison sentences for the Section

3147 violations under the mistaken belief that it had no power to place petitioner on probation for those offenses. This contention is without merit. At the time of petitioner's sentencing, the district court was bound by *United States* v. *Rodriguez*, 794 F.2d 24 (2d Cir. 1986), which held that a sentencing court could not place a defendant on probation for an offense that was subject to enhanced punishment under Section 3147. In March 1987, about five months after petitioner was sentenced, this Court reversed the Second Circuit's decision in *Rodriguez*, holding that Section 3147 does not divest sentencing judges of their traditional power to impose probation for an offense. *Rodriguez* v. *United States*, 480 U.S. 522 (1987).

Petitioner's contention that he should "get [the] benefit" of this Court's decision in *Rodriguez* (Pet. 15) overlooks the fact that the district court had no intention of placing petitioner on probation. As the district court explained, both it and the advisory sentencing panel agreed that petitioner should receive a lengthy term of imprisonment for his offenses. In its opinion denying petitioner's motion to correct the sentence, the district court removed all possible doubt on this point by stating that it had "reconsidered the sentences imposed with the clear understanding that probation was a permissible alternative under [section] 3147," and reaffirmed them.[3] Pet. App. 12A-13A.

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[3] Petitioner's reliance (Pet. 16) on *United States* v. *Mudd*, 817 F.2d 840 (D.C. Cir. 1987), is misplaced. There, a sentence under Section 3147 was reversed because the sentencing court wanted to place the defendant on probation but erroneously believed that it lacked the power to do so. In *United States* v. *DiRusso*, 535 F.2d 673 (1st Cir. 1976), and *United States* v. *Stewart*, 779 F.2d 538 (9th Cir. 1985), the district court was misinformed about the possibility of parole and might have imposed a more lenient sentence if it had been correctly informed. Here, in contrast, petitioner was not prejudiced, because the district court never had any intention of placing him on probation and reaffirmed

2. Petitioner next contends (Pet. 19-20) that the district court violated Fed. R. Crim. P. 11(c)(1) by incorrectly advising him of the mandatory minimum penalty provided by law under Section 3147. As an initial matter, it is not clear that this issue was properly raised in petitioner's Rule 35 motion. The version of Rule 35 applicable in petitioner's case required that motions to correct a sentence imposed "in an illegal manner" must be made within 120 days of the imposition of sentence. Petitioner's motion was filed almost a year after his sentencing. In any event, the district court correctly advised petitioner that the mandatory minimum sentence under Section 3147 was two years. Pet. App. 2A-3A. Petitioner appears to assert that the district court should have advised him of its power to impose probation for his offenses, but probation under 18 U.S.C. 3651 (1982) simply is not a minimum "sentence" under Section 3147. See *Rodriguez*, 480 U.S. at 524 (distinguishing between sentence and execution of sentence).

Moreover, it is difficult to see how petitioner could have been prejudiced by an *overstatement* of the minimum penalty. The district court intended to sentence petitioner to a lengthy term of imprisonment; petitioner chose to plead guilty despite the court's statement that he should expect to be sentenced to a term of 20 years. The absence of prejudice is fatal to petitioner's claim. See *United States* v. *Timmreck*, 441 U.S. 780 (1979) (guilty plea not subject to collateral attack under 28 U.S.C. 2255 for failure to comply with the formal requirements of Rule 11 absent some showing of prejudice). Finally, the question whether the district court correctly advised petitioner of the mandatory minimum sentence under Section 3147 is of no continuing importance, because Section 3147 no longer prescribes a mandatory minimum sentence.

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his sentence "with the clear understanding that probation was a permissible alternative." Pet. App. 13A-14A.

3. Petitioner's final contention (Pet. 20-27) is that "Section 3147 provides for a *single* enhancement to run consecutively to those sentences imposed for other offenses." Pet. 23. Petitioner asserts that, if the district court were required to impose only a single enhancement under Section 3147, he "would have received much less of a jail sentence." Pet. 27. In light of the initial sentencing recommendations of 15 to 20 years' imprisonment, and the court's statement that the sentence "was not imposed solely in consideration of our interpretation of Section 3147" (Pet. App. 10A), petitioner's assertion is untenable.

In addition, the district court's interpretation of the statute is reasonable and does not conflict with any decision of a court of appeals. Section 3147 states that "[a] person convicted of an offense" committed while the person is released on bail "shall be sentenced, in addition to the sentence prescribed for the offense," to an additional term of imprisonment. The statute further provides that "[a] term of imprisonment imposed pursuant to this section shall be consecutive to any other sentence of imprisonment." The ordinary meaning of these words requires that a sentence imposed under Section 3147 must be consecutive to every other sentence imposed on the defendant. The structure of Section 3147 is consistent with its plain language. Section 3147 applies to "an offense committed" while the defendant is on release for another offense. If a defendant has committed multiple offenses while on release, Section 3147 applies to each and every such offense. Finally, imposing consecutive sentences for each violation of Section 3147 is consistent with the deterrent policy of the statute. If petitioner's interpretation of the statute were accepted, the deterrent effect of the mandatory minimum sentencing provision of Section 3147 would be significantly reduced as to any defendant who had already committed one crime while released on bail.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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